



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 11, 1995

Ms. Lan P. Nguyen  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR95-556

Dear Ms. Nguyen:

On behalf of the City of Houston (the "city"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 31335.

In February 1994 the city issued a request for professional services proposals relating to the creation of software for the Self Insured Workers' Compensation Third Party Administration. You state that the city since has awarded a contract for the project. The requestor seeks to review the proposals.

As a preliminary matter, we note that the city received the requestor's written request for the information on September 19, 1994. The city did not seek the decision of the attorney general until January 10, 1995. The city thus failed to comply with section 552.301(a) of the Government Code, which requires a governmental body that receives a written request for information it believes is excepted from required public disclosure to request the attorney general's decision within ten calendar days of receiving the request. Failure timely to request the attorney general's decision results in a presumption that the requested information is public, *see* Gov't Code § 552.302, and a governmental body may overcome this presumption only by demonstrating that the information is confidential or that an exception designed to protect the interest of a third party is applicable. *See* Open Records Decision No. 552 (1990) at 1.

You contend that the information requested here may contain trade secret information excepted from required public disclosure by section 552.110 of the Government Code. Section 552.110 is designed to protect the interest of a third party.

Consequently, we will proceed to consider whether section 552.110 excepts the requested information from required public disclosure.<sup>1</sup>

Section 552.110 excepts from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. We are unaware of any claim that the requested information constitutes commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Accordingly, we need address only the trade secret branch of section 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

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<sup>1</sup>Two of the companies that submitted a proposal to the city claim that section 552.104 of the Government Code excepts the requested information from required public disclosure. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects the government's interest in purchasing by ensuring that the bidding process will be truly competitive. See Open Records Decision Nos. 583 (1990) at 4, 554 (1990) at 3. Section 552.104 is not designed to protect the interest of private parties submitting information to the government. Open Records Decision No. 592 (1991) at 8. Thus, because the city did not raise section 552.104 within ten days of receiving the written request letter, we cannot now consider it.

Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. E.g., Open Records Decision Nos. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. You have informed us that the city has awarded the contract for which the requested proposals were submitted.

The Restatement lists six factors we must consider when determining whether particular information is a trade secret:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.*; see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

When a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim that the information is a trade secret if the person establishes a prima facie case for the exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. On the other hand, when an agency or company does not provide relevant information regarding factors necessary to make a claim under section 552.110, a governmental body has no basis for withholding the information under section 552.110. See Open Records Decision No. 402 (1983) at 2.

Two of the companies that submitted proposals to the city, Sedgwick James of Houston and F.A. Richard & Associates, have not claimed that any or all of the information in their proposals constitutes trade secret information. The city therefore must release those proposals to the requestor. Both Crawford & Company and IHDS Corporation (which submitted a proposal under the name "Care Systems") have submitted letters to this office claiming that their proposals, in their entirety, constitute trade secret information.

Crawford & Company states that its proposal sets forth the company's methodology and internal procedures in providing workers' compensation third party administration services and that such services "are a major aspect" of the company's business in this state. Crawford & Company further states, "We consider our internal procedures, methodology and policies to be confidential commercial information and trade secrets." Crawford & Company fails to allege facts satisfying any of the six factors from the Restatement. We conclude, therefore, Crawford & Company has not established a prima facie case that the information contained in its proposal to the city constitutes trade secret information excepted from required public disclosure by section 552.110 of the Government Code. The city must release Crawford & Company's proposal, in its entirety, to the requestor.

IHDS Corporation ("IHDS") lists six items it believes demonstrate a prima facie case that its proposal, in its entirety, constitutes trade secret information protected by section 552.110. Three of the statements listed are conclusory in nature; IHDS fails to supply any factual information to substantiate its assertions. We must, therefore, consider whether the remaining statements sufficiently establish a prima facie case that IHDS' proposal constitutes trade secret information.

IHDS avers that its personnel who have a thorough knowledge of its product, pricing, and technical aspects are employed under noncompete agreements. IHDS also advises that it has expended over \$15 million to develop the product and related pricing structure. Finally, IHDS states that a competitor could not duplicate IHDS' product or pricing structure for at least two years unless the competitor directly received information from IHDS.

We have reviewed IHDS' proposal to the city and considered IHDS' arguments. In our opinion, IHDS has failed to establish a prima facie case that the information in its proposal constitutes trade secret. We do not know, for example, whether IHDS restricts knowledge of its product and pricing structure within the company. Nor do we know whether, if IHDS has similar contracts with other workers' compensation third party administrators, it restricts usage of reports containing information similar to that contained in the sample risk management reports included in the proposal. We conclude, therefore, that section 552.110 of the Government Company does not except IHDS' proposal from required public disclosure.

In summary, none of the requested proposals constitutes trade secret information. Consequently, the city must release the requested information, in its entirety, to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 of the Government Code regarding any other records. If you have questions about this ruling, please contact this office.

Yours very truly,

A handwritten signature in black ink, reading "Kimberly K. Oltrogge". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Kimberly K. Oltrogge  
Assistant Attorney General  
Open Government Section

KKO/LRD/rho

Ref.: ID# 31335

Enclosures: Submitted documents

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